STATE OF MICHIGAN

IN THE SUPREME COURT

SUE H. APSEY and ROBERT APSEY, JR.,

Plaintiffs-Appellants,

v.

MEMORIAL HOSPITAL, d/b/a HEALTHCARE CENTER, RUSSELL H. TOBE, D.O., JAMES H. DEERING, D.O., JAMES H. DEERING, D.O., P.C., and SHIAWASSEE RADIOLOGY CONSULTANTS, P.C.,

Defendants-Appellees.

Supreme Court
Docket No.

Court of Appeals No. 251110

Shiawassee Circuit Court
No. 01-007289-NH

/

AMICUS CURIAE BRIEF
OF THE MICHIGAN TRIAL LAWYERS ASSOCIATION
IN SUPPORT OF PLAINTIFFS-APPELLANTS'
CROSS APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

/

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ORDER BEING APPEALED FROM AND RELIEF REQUESTED

The Cross Application of Plaintiffs-Appellants seeks leave to appeal from the Court of Appeals' published decision dated June 9, 2005 in *Apsey v Memorial Hospital, On Reconsideration*, ___ NW2d ___, 2005 WL 1405823 (Mich App), attached as **Exhibit 1**.

In that opinion, a two-person majority in the Court of Appeals concluded that the Affidavit of Merit which was attached to the Plaintiff's Complaint was defective because, although signed under seal by a notary public in the State of Pennsylvania, and otherwise in compliance with the requirements of MCL 600.2912d, the authority of the notary public was not further certified under MCL 600.2102.

In light of this State's passage of a uniform act applying to all notarial acts outside of the state, namely the Uniform Recognition of Acknowledgments Act (hereinafter URAA), MCL 565.261, et seq, which unambiguously provides for an *"additional"* means of validating an out-of-state affidavit under Section 8, not requiring its further certification under MCL 600.2102, Amicus MTLA urges this Court to grant Plaintiffs-Appellants' Cross Application and give full consideration to the important legal issues raised in this case. In the alternative, Amicus MTLA requests that this Court summarily reverse the Court of Appeals' determination that Plaintiffs-Appellants' Affidavit of Merit had to have an additional certification and remand this case to the Shiawassee County Circuit Court for further proceedings.

STATEMENT OF QUESTIONS PRESENTED

I. SHOULD THIS COURT SHOULD GRANT PLAINTIFFS-APPELLANTS' CROSS APPLICATION AND REVIEW AND REVERSE THE COURT OF APPEALS MAJORITY'S DECISION THAT MCL 600.2102 GOVERNS THE AUTHENTICATION OF AN OUT-OF-STATE AFFIDAVIT USED IN A MICHIGAN COURT PROCEEDING?

Plaintiffs-Appellants say the answer is "Yes."

Defendants-Appellees say the answer is "No."

Amicus Curiae MTLA says the answer is "Yes".

II. SHOULD THIS COURT GRANT PLAINTIFFS-APPELLANTS' CROSS APPLICATION TO CONSIDER THE QUESTION OF *WHETHER, ASSUMING A CLEAR CONFLICT BETWEEN THE* URAA AND MCL 600.2102, THE COURT OF APPEALS ERRED IN IT'S RESOLUTION OF THAT CONFLICT?

Plaintiffs-Appellants say the answer is "Yes."

Defendants-Appellees say the answer is "No."

Amicus Curiae MTLA says the answer is "Yes".

III. SHOULD THIS COURT REVIEW THE QUESTION OF WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT A COMPLAINT FILED BY A MEDICAL MALPRACTICE PLAINTIFF WITH A VALID AFFIDAVIT OF MERIT THAT DOES NOT CONTAIN A § 2102 CERTIFICATION IS A NULLITY AND, *THEREFORE, DOES NOT TOLL THE STATUTE OF LIMITATIONS?*

Plaintiffs-Appellants say the answer is "Yes."

Defendants-Appellees say the answer is "No."

Amicus Curiae MTLA says the answer is "Yes".

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Amicus MTLA adopts by reference the Statement of Material Proceedings And Facts contained in the Cross Application for Leave To Appeal filed by the Plaintiffs-Appellants.

ARGUMENT

I. THIS COURT SHOULD GRANT PLAINTIFFS-APPELLANTS' CROSS APPLICATION AND REVIEW AND REVERSE THE COURT OF APPEALS MAJORITY'S DECISION THAT MCL 600.2102 GOVERNS THE AUTHENTICATION OF AN OUT-OF-STATE AFFIDAVIT USED IN A MICHIGAN COURT PROCEEDING.

The majority's decision in *Apsey v Memorial Hospital, On Reconsideration*, ___ NW2d ___, 2005 WL 1405823 (Mich App) released on June 9, 2005 (**Exhibit 1**), was erroneously decided. The decision makes several significant errors regarding statutory construction. One significant error is that the panel's decision completely nullifies Section 8 of the URAA, MCL 565.268, which unambiguously provides for an *"additional"* means of validating an out-of-state affidavit of merit, not requiring its further certification under MCL 600.2102.

The majority's holding in *Apsey* places an added and unnecessary burden on medical malpractice plaintiffs, as well as other litigants in this state, to obtain "certification" by the clerk of a court of record in the county where the affidavit was taken, which the Legislature intended to obviate by the passage of a uniform act, the URAA, to simplify notarial acts outside the state. The URAA was designed to apply to all notarial acts performed outside this state and explicitly does not require the additional certification imposed by the majority in *Apsey*.

The majority's holding in *Apsey* would include not only affidavits of merit in medical malpractice cases, but also all affidavits that "may be received in judicial proceedings," thus eliminating a total category of "notarial acts" from the reach of the URAA. Thus, *Apsey* would require that all affidavits from any person living out-of-state would have to obtain certification of the notary public by the clerk of a local court. Imposing this requirement has created difficult and expensive burdens on the conduct of all state court actions.

For future cases filed after *Apsey*, medical malpractice victims not only have this added burden of "certification", which is both expensive and time-consuming, but also will be precluded from using any expert from 17 sates and the District of Columbia, where it is not even possible to comply with this "certification" requirement by a clerk of a court of record.

Given the significance of this issue to the conduct of all state court actions, and the majority's misapplication of well-established rules of statutory construction in reaching its decision, Amicus MTLA requests this Court to grant the Plaintiffs-Appellants' Cross-Application for Leave To Appeal and give full consideration to the important legal issues presented by this case. Alternatively, Amicus MTLA requests that this Court summarily reverse the Court of Appeals' decision and remand this case to the circuit court for further proceedings.

A. The History Of These Two Acts Is Relevant And Necessary To An Understanding Of Why The Majority In *Apsey* Erred In Finding That § 2102 Controlled Over The Additional Method Provided In Section 8 Of The URAA.

The majority's opinion in *Apsey* completely ignores of the history of these acts. In particular, the history of this State's adoption of the URAA is crucial to a decision regarding the interplay between these two statutes. The legislative history of an act may be examined to ascertain the reason for the act and the meaning of its provisions. *DeVormer v DeVormer*, 240 Mich App 601, 607, 618 NW2d 39 (2000).

Plaintiffs-Appellants' Cross Application clearly and succinctly sets forth the history of the "certification" requirement of MCL 600.2102, beginning with RS 1846, c. 102, § 33 and then Public Act 1879, No. 147 (which is now codified as MCL 600.2102) effective January 1, 1963 as part of the Revised Judicature Act of 1961 (Act 236).

That detailed history will not be repeated here. Suffice it to say, in its present form, MCL 600.2102 is virtually the *same as the original statute passed in 1879.* It provides that where by law the affidavit of any person residing in another state is required to be received in judicial proceedings in this state, to entitle same to be read it must be authenticated by the methods listed, which includes the following:

> (4) If such affidavit be taken in any other of the United States, or in any territory thereof, it may be taken before a commissioner duly appointed and commissioned by the governor of this state to take affidavits therein, or before any notary public or justice of the peace authorized by the laws of such state to administer oaths therein. **The signature of such notary public** or justice of the peace, **and the fact that at the time of the taking of such affidavit the person before whom the same was taken was such notary public** or justice of the peace, **shall be certified by the clerk of any court of record in the county where such affidavit shall be taken, under the seal of said court** (emphasis added).

This statute has been rarely used over the past 125 years, as is evident by the dearth of opinions referencing it. One such opinion is an 1890 case by the name of B*erkery v Reilly, Judge*, 82 Mich 160, 167-168, 46 NW 436 (1890) (relied upon by the majority in *Apsey* for its interpretation of the word "read"). In *Berkery*, the Court construed the 1897 version of the current § 2102 and held that an affidavit signed and notarized in Ohio could not be used in a Michigan court because it did not also have the certification required by PA 1879, No. 147. The Court noted that the affidavit was to be used to support the judgment concerning the amount due. At the time *Berkery* was decided, Michigan had not yet adopted the URAA. The first version of the URAA, Public Act No. 185, was adopted in Michigan in 1895, five years after the *Berkery* decision. Thus, at the time of *Berkery*, there was no additional, alternative means for verifying a notary public's signature.

Another decision interpreting the "certification" statute is *In Re Alston's Estate Beecher v Jamison*, 229 Mich 478, 481-482, 201 NW 460 (1924) (also relied upon by the *Apsey* Court). In that case, the Supreme Court noted: "Appellant offered no testimony and rested *her case entirely* on the petition (affidavit). The Court held that the affidavit could not be considered based upon § 2102. *Id* at 480. The URAA was not raised or even discussed in *In re Alston's Estate* so, again, the Court was not deciding the interplay of these two statutes.

Based upon both Berkery and *In re Alston's Estate*, it appears that §2102 has been interpreted as involving the narrow purpose of using the affidavit as evidence to support the claim or judgment, which is not the case with an Affidavit of Merit.

Another case is *Wallace v Wallace*, 23 Mich App 741, 744-745, 179 NW2d 699 (1970). Again in *Wallace*, the URAA was not considered; the Court was interpreting only the certification statute. In *Wallace*, the Court of Appeals held that the lack of certification of the notary's signature was no more than a technical defect capable of being cured nunc pro tunc.

The URAA also evolved from a series of earlier 20th century enactments recognizing that such local restrictions and parochial prejudices regarding notarial acts stifled commerce and transactions between persons in different jurisdictions. As Plaintiffs-Appellants' aptly demonstrate in their Cross-Application, the URAA was first adopted in Michigan in 1895 and, from its inception, the URAA indicated that it was designed to be "in addition" to any other forms previously established in the state of Michigan for acknowledging the acts of notary publics.

The URAA in its current form was enacted in 1969 and is codified under MCL 565.262 *et seq*. The Prefatory Note to the URAA indicates that adoption of this act was to be used as an alternative method for validating notarial acts and, as a result, legislatures adopting this uniform act

would not be required to repeal pre-existing law on the subject of how out-of-state affidavits would be validated for use in a state adopting the uniform act.

The National Conference of Commissioners on Uniform State Laws intended the URAA to meet the need for uniformity among the states with respect to authentication of affidavits executed in another state or a foreign country. The drive behind promulgation of a uniform law for authentication of notarial acts and the acknowledgment of affidavits taken outside of a state was based upon a *need for simplification due to technological changes and increased mobility among states*, which made out-of-state affidavits increasingly more important in American courts:

> Since its first Uniform Acknowledgment Act in 1892, the National Conference has promulgated, amended and revised acts in 1914, 1939, 1942, 1949 and in 1960. Each of these acts had a multiple purpose: **to establish a simplified and certain form for taking acknowledgements both within and without the state; and to specify how acknowledgments and other notarial acts taken out of the state could be taken so as to be recognized in the enacting state.** Each amendment or revision has been made necessary and desirable by *technological changes* (e.g., use of facsimile signatures); by the *mobility of the American population* (e.g., acknowledgment without the United States) and by changes in titles of officers, other than notaries public, who are authorized to take acknowledgments in various parts of the world."

Uniform Recognition of Acknowledgments Act, Prefatory Note, 14 ULA, p 233 (emphasis added); *see also Mid-American National Bank v Gymnastics*, 6 Ohio App 3d 11, 451 NE2d 1243 (1983), citing this same Prefatory Note (emphasis added).

The current version of the URAA, effective March 20, 1970,[1] states in pertinent part:

MCL 565.262. **Notarial acts, definition, persons performing out of state.**

Sec. 2. As used in this act:

(a) "Notarial Acts" means acts that the laws of this state authorize notaries public of

[1] Section 1 of the Act, MCL 565.261, is the title and indicates that the act shall be referred to as the "uniform recognition of acknowledgments act".

this state to perform, including the administering of oaths and affirmations, taking proof of execution and acknowledgements of instruments, and attesting documents. **Notarial acts may be performed outside this state for use in this state with the *same effect as if performed by a notary public of this state by*** ...

(i) A notary public authorized to perform notarial acts in the place in which the act is performed.

MCL 565.263. **Authority of officer, authentication**:

Sec. 3. (1) If the notarial act is performed by any of the persons described in *subdivisions (a) to (d) of section 2, ...* ***the signature, rank, or title, and serial* number, if any, of the person are sufficient proof of the authority of the holder of that rank or title to perform that act. Further proof of authority is not required**.

* * *

(4) The signature and title of the person performing the act are **prima facie** evidence that ***he is a person with the designated title and that the signature is genuine***.

MCL 565.264. **Certificate of person taking acknowledgment**.

Sec. 4. The person taking an acknowledgment shall certify that the person acknowledging appeared before him and acknowledged he executed the instrument; and the person acknowledging was known to the person taking the acknowledgment or the person taking the acknowledgment had satisfactory evidence that the person acknowledging was the person described in and who executed the instrument.

MCL 565.268. **Prior notarial acts unaffected**.

Sec. 8. **A notarial act** performed prior to the effective date of this act is not affected by this act. **This act provides an additional method of proving notarial acts**. Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state (emphasis added).

Since 1994, attorneys in this state have been required to file affidavits of merit in support of medical malpractice cases. MCL 600.2912d. They have viewed the URAA as providing, *as it plainly says*, an additional method of proving the validity of an out-of-state affidavit sworn before an out-of-state notary public, one that recognized that the authority, title, and signature of the notary

are evidenced by the signature and title of the notary subscribing the affidavit. See *1 Mich Civ Jur Acknowledgments, § 1, General Considerations*, which states:

> Michigan has adopted the Uniform Recognition of Acknowledgments Act, MCL 565.261 to 565.270. A notarial act performed prior to the effect date of the Uniform Recognition of Acknowledgments Act is not affected by such Act.

Thus, attorneys in this state have reasonably read the URAA as obviating the need to obtain formal certification of that authority, title and signature, as required by MCL 600.2102, in order to present a valid affidavit of merit to the court in compliance with MCL 600.2912d. Indeed, even the majority of the Court of Appeals in *Apsey* viewed the affidavit of merit at issue as *valid under the URAA*:

> If the present inquiry were to be decided based on the URAA, the notarization of the affidavit in question would indisputably be valid. Plaintiffs' affidavit of merit bears the signature and notary seal of a Pennsylvania notary public. That status in another state carrier over to this state, and the signature and title are prima facie evidence of authenticity, MCL 565.263(4).

Opinion, p 3.

The majority of the circuit courts of this State have also viewed the URAA has obviating the need to obtain formal certification of the notary's authority. The Court of Appeals' attempt to "harmonize" these two statutes, however, has completely nullified Section 8 of the URAA, making it nothing more than surplusage. The Court's decision has created difficult and expensive burdens on the conduct of all state court actions in contradiction of the URAA, which was intended to simplify and make uniform all notarial acts outside of the state of Michigan.

B. The Majority In *Apsey* Violated The Fundamental Principles Of Statutory Construction That A Court May Not Look Beyond The Plain Language Of The Act Itself For Interpretation Where The Language Is Clear, Unambiguous, and Capable Of Interpretation On Its Own Terms And A Court May Not Render Any Portion Of A Statute Surplusage.

When faced with questions of statutory interpretation, a court's obligation is, first and foremost, to discern and give effect to the Legislature's intent as expressed in the words of the statute. *Jenkins v Patel, MD*, 471 Mich 158, 684 NW2d 346 (2004); *Gladych v New Family Homes, Inc*, 468 Mich 594, 664 NW2d 705, 707 (2003), *reh den* 668 NW2d 145 (2003); *Pohutski v City of Allen Park*, 465 Mich 675, 683, 641 NW2d 219 (2002); *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402, 605 NW2d 300 (2000); *Massey v Mandell*, 426 Mich 375, 379-380, 614 NW2d 70 (2000). "We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous." *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27, 528 NW2d 681 (1995) (emphasis added). Where the language is unambiguous, "we presume that the Legislature intended the meaning clearly expressed--no further judicial construction is required or permitted, and the statute must be enforced as written." *DiBenedetto, supra*, at 402, 605 NW2d 300. Because the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312, 645 NW2d 34 (2002).

Similarly, courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature. *See Lansing v Lansing Twp*, 356 Mich 641, 649-650, 97 NW2d 804 (1959).

A court must also avoid an interpretation that would render any part of the statute surplusage

or nugatory. *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311, 596 NW2d 591 (1999); *Koontz v Ameritech Services, Inc*, supra, 466 Mich at 313.

The majority's decision in *Apsey* violates each of the foregoing rules of statutory construction.

In *Koonz*, this Court held that the Court of Appeals erred in failing to give effect to every word and phrase of MCL 421.27(f), the Employment Security Act, which mandates coordination of unemployment benefits; the Court held this coordination should include pension benefits plaintiff would have received if she had elected the monthly payment option. This Court in *Koontz* also held:

> We do not apply preferential rules of statutory interpretation, however, without first discovering an *ambiguity* and attempting to discern the legislative intent underlying the ambiguous words. (citing *Crowe v Detroit*, 465 Mich 1, 13, 631 NW2d 293 (2001).

Id at 319; *see also Pohutski v City of Allen Park, supra,* 465 Mich at 683 (emphasis added).

There is no ambiguity in the language of the URAA. The defendants below never maintained there was any ambiguity in the URAA. Nor did the Court of Appeals majority ever find an ambiguity in the URAA. Clearly they could not. The language is clear. The Legislature clearly and unambiguously indicated in Section 8 of the URAA that it was providing an **additional method** of **proving notarial acts**. It does not say only notarial acts other than affidavits or only notarial acts used in a judicial proceeding:

> Sec. 8. A notarial act performed prior to the effective date of this act is not affected by this act. This act provides an **additional method** of proving notarial acts. Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state.

The majority in *Apsey* focused only on the third sentence of Section 8 and completely ignored the first and second sentences. However, as Plaintiffs-Appellants set forth in their Cross Application in discussing the history of the URAA, the National Conference of Commissioners on Uniform State Laws, citing to the language contained in the third sentence of section 8 of the URAA, specifically indicated in their *Prefatory Note* that state legislators adopting this uniform act would *not be required to repeal existing laws which might conflict with the URAA.*

In focusing on this third sentence of Section 8, and ignoring the first two sentences, the Court of Appeals completely eliminated or nullified those first two sentences, in violation of statutory construction rules. This error is significant.

The first sentence of Section 8 plainly states that "a notarial act" "prior to the effective date of this act" is not affected by this act. The use of the singular form of "act" indicates the Legislature was only reference to a specific act of a notary that may have occurred before the effective date of the act. In addition, the plain implication of this sentence is that a notarial act performed *after* the effective date of this act is affected by this act. *See Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285, 298, 565 NW2d 650 (1997) ("The express mention of one thing in a statute implies the exclusion of other similar things".) In other words, notarial acts performed after the effect date of this act would come under the provisions of the URAA.

The second sentence of Section 8, of course, plainly indicates that the Legislature was providing an additional method of proving notarial acts, as discussed above. [2]

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[2] The majority's declared that by taking advantage of the Legislatively "expressed" additional method provided by Section 8 of the URAA, particularly for purposes of an Affidavit of Merit, then MCL 600.2102 is rendered nugatory or worthless (Opinion, p 5, fn 2). This argument is irrelevant given the first and third sentences of Section 8 of the URAA and the intent behind passage of a uniform act.

The majority in *Apsey* candidly admitted that under the URAA, the plaintiffs' affidavit of merit was "**indisputably valid**", garnering that conclusion from the plain, unambiguous language of the URAA:

> If the present inquiry were to be decided based on the URAA, the notarization of the affidavit in question would indisputably be valid. Plaintiffs' affidavit of merit bears the signature and notary seal of a Pennsylvania notary public. That status in another state carries over to this state, and the **signature and title are prima facie evidence of authenticity**, MCL 565.263(4). [3]

Opinion, p 3 (emphasis added).

After having thus successfully interpreted the URAA as leading unequivocally to this conclusion, the majority then proceeded to apply *select* rules of statutory construction to negate and defeat their own reasonable interpretation of the plain language of the URAA. In doing so, the majority inexplicably defied the repeated admonition of this Court that when the meaning of an act can be gleaned from its own language, no resort to further statutory construction of the act is legally proper. "Where the language is unambiguous, we presume that the Legislature intended the meaning clearly expressed -- no further judicial construction is required or permitted, and the statute must be enforced as written." *Koontz v Ameritech supra; Pohutski v City of Allen Park, surpa.*

It is not appropriate to resort to *selective* rules of construction where the statute can be interpreted without resort to such tools, as, plainly, the Court of Appeals was capable of doing here with respect to the meaning of the URAA and its validation of an affidavit executed before a notary outside of Michigan.

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[3] The validity of the notary's signature in *Apsey* was never challenged by the defendants.

Under the guise of harmonizing these two statutes, the majority also inappropriately applied the selective rule that the terms of a specific statute is given priority over a more general statute, and held that MCL 600.2102 is "more specific" and, therefore, controls the execution of all affidavits in this State:

> [W]e find that the more specific requirements of MCL 600.2102 of the Revised Judicature Act control over the general requirements of MCL 565.262 of the URAA. [citations omitted]. In other words, MCL 565.262 governs notarial acts, including execution of affidavits, in general, to which MCL 600.2102 adds a special certification requirement when the affidavit is to be read, meaning officially received and considered by the judiciary.

Opinion, p 5 (emphasis added).

This reasoning is flawed. The URAA is no less specific in declaring that it applied to **all** out-of-state notarial acts "used" in this state, without limitation -- and using an affidavit in a judicial proceeding is one of the primary uses of such notarial acts -- just the same as a notarial act would be in Michigan. Just as an affidavit of merit executed before a Michigan notary public need not be certified to be "used" by a plaintiff to comply with the Affidavit Of Merit Statute, MCL 600.2912d, so, too, an affidavit of merit sworn before an out-of-state notary also need not be certified to be "used" by a plaintiff to comply with MCL 600.2912d. Further, the majority declared that § 2102 "adds" the certification requirement, which is also flawed reasoning given that the URAA was passed after § 2102. If anything, it is the URAA that add provisions affecting notarial acts, not § 2102.

The majority's decision completely renders the first and second sentences of Section 8 of the URAA, "surplusage or nugatory", in clear violation of established rules of statutory construction. *Koontz v Ameritech, supra* at 313.

As Plaintiffs-Appellants establish in their Cross-Application, the two statutes at issue here are easily harmonized based upon the Legislature's expression of its intention of providing an additional method of proving notarial acts, a fact which is extremely reasonable given that MCL 600.2102 has rarely been used, and in recent times, the function of certification of a notary is routinely performed by the secretary of state's office in our sister states, making actual strict compliance with MCL 600.2102 often impossible (as discussed *infra*).

Further, when the Michigan Legislature passed this uniform law, it was aware of the Commissioners' purposes in establishing a uniform law and recognized its statement in the Prefatory Note that state legislators adopting this uniform act would not be required to repeal existing laws:

> This act **does not require amendment of existing acknowledgment law in the state** unless the state chooses to make an amendment. This act deals only with "recognition of notarial acts" and it is a recognition statute "**in addition to any other recognition statute now in effect in the state**." While as a matter of tidying-up the statute books, it may be desirable to repeal some of the existing recognition statutes such as the earlier Uniform Acknowledgment Acts, that is not necessary. **This act may stand alone**.

14 ULA at 234 (emphasis added). Thus, with the passage of the URAA, a party may utilize either statute, but there is no longer a requirement that a party must utilize § 2102. The URAA may stand alone.

In further going beyond the clear and unambiguous language of the URAA, the majority in *Apsey* also based its conclusion that MCL 600.2102 controls over the URAA on the holding in *Berkery v Reilly, supra*, which was decided in 1890, five years before passage of the first version of the URAA in Michigan. Thus, at the time the *Berkery* court held that an affidavit signed and notarized in Ohio could not be used in a Michigan court because it did not also have the

certification required by PA 1879, No. 147 (now § 2102), *there was no additional means for verifying a notary public's signature.*

The majority in *Apsey* also relied upon a 1924 decision of our Supreme Court, *In re Alston's Estate, supra.* The majority in *Apsey* states that *In re Alston's Estate dictates* that "in order for the court to consider" an affidavit signed by an out-of-state notary public, "the signature of the sister-state notary public must be certified by the clerk of the court of record in the county where the affidavit was executed." (Opinion, p 2). The majority also relies upon *Wallace v Wallace,* 23 Mich App 741, 744-745, 179 NW2d 699 (1970), which it maintains mirrors the Supreme Court's holding in *In re Alston's Estate.* (Opinion, p 3).

The majority's reliance on these two cases is misplaced for several reasons.

First, the Courts in *In re Alston's Estate, supra,* and *Wallace, supra,* were not presented with the URAA, and therefore, the Courts in those decisions did not consider the interplay of these two statutes.

Second, the Court of Appeals ignores other decisions where the interplay of these two statutes was discussed and the Court held that "certification" of the notary's signature is not required because of the Legislature's 1895 adoption of the URAA, which was codified in CL 1929, § 13333. *See Reid v Rylander*, 270 Mich 263; 258 NW 630 (1935) (affidavit notarized by a New York notary did not need a certification signed by a court clerk) and *Sipes v McGhee*, 316 Mich 614; 25 NW2d 638 (1947), *rev'd on other grounds sub nom Shelly v Kramer*, 334 US 1 (1948) (signature acknowledged before a notary public in Indiana did not need certification of the clerk of a court attesting to the notary's authority).

Based upon these significant and multiple errors in statutory construction committed by

the majority in *Apsey*, this Court should revisit this decision under the proper application of well-established rules of statutory construction, which clearly require a different result.

C. The Majority In *Apsey* Erred In Ignoring This Court's Admonition That Strict Construction Of A More Specific Statute Is Not Applied Where It Would Defeat The Main Purpose Of Another Statute Relating To The Same Subject, In this Case The URAA.

Even assuming for purposes of argument that the Court of Appeals in *Apsey* is correct that § 2102 is "more specific" than the URAA,[4] which Amicus MTLA disputes, in *State Treasurer v Schuster,* 456 Mich 408, 417, 572 NW2d 628 (1998), a case which the majority in *Apsey* relied upon for its holding that §2102 was more specific and, therefore, controls over the URAA, this Court refused to apply a "strict construction" of a more specific statute where it would defeat the main purpose of another statute relating to the same subject, stating:

> We find that the pension act's non-assignment provision and the State Correctional Facility Reimbursement Act are in pari materia because both enactments address pensions. However, **this Court has refused to apply rules**

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[4] The majority's interpretation misapplies the concept of general and more specific statutes. The panel cited *Gebhardt v O'Rourke*, 444 Mich 535, 510 NW2d 900 (1994), for the proposition that a "more specific" statute controls over a general statutory provision. In *Gebhardt*, however, the Court was dealing with one statute that contained numerous provisions regarding statutes of limitations and accrual of claims and held: "Where a statute contains a general provision and a specific provision, the specific provision controls". *Id* at 542. Thus, the Court held:

> Here, § 5805 speaks of accrual in general terms, while § 5838 defines accrual in specific terms. Therefore, following rules of construction, the specific definition of accrual as set forth in § 5838 is interpreted to be consistent with § 5805 and is controlling.

Id at 543. That is not the situation here. The URAA is clear and unambiguous on its face so it was not appropriate for the majority to resort to the selective rule used in *Gebhardt*, especially since the majority in *Apsey* was not dealing with one statutory provision, as in *Gebhardt*, but rather two separate statutes, which are easily "harmonized" without nullifying Section 8 of the URAA.

> **that the more specific statute controls where such "strict construction . . . would defeat the main purpose of other statutes relating to the same subject.**" *Id.* at 560, citing *Rathbun v Michigan, 284 Mich 521; 280 NW 35 (1938).* In this case, we refuse to adopt the Court of Appeals construction of the statutory provisions at issue because it effectively nullifies the express language in the reimbursement act and, consequently, defeats the main purpose of that statute.

Id at 542, emphasis added.

The Court of Appeals in *Apsey* clearly violates this admonition since it's construction of § 2102 as controlling over the URAA completely defeats the purpose of Section 8 of the URAA, which is to provide " an additional means of method of proving notarial acts." Under *Apsey*, a plaintiff in a medical malpractice lawsuit who uses an out-of-state expert to sign the required affidavit of merit simply cannot avail him or herself of this additional method of proving the notary's act.

In fact, under the circumstances presented by this case, it is even more important that this Court adhere to its foregoing policy of not applying a strict construction of a more specific statute where it would defeat the purpose of other statutes relating to the same idea. That is because it is impossible to comply with § 2102's certification requirement in seventeen (17) states and the District of Columbia because those states do not have the clerk of a court of record certify the notary's signature, but rather utilize the secretary of state for this purpose. Those states are: Colorado, Connecticut, Florida, Illinois, Iowa, Kansas, Louisiana, Massachusetts, Minnesota, Missouri, Nevada, New Jersey, North Carolina, Oregon, Rhode Island, Texas, Washington, Maine and Tennessee. Thus, strict compliance with MCL 600.2102(4) would not only defeat the purpose

of Section 8 of the URAA, which is to provide an *alternate* means of verifying a notary signature, but also it would prohibit plaintiffs and defendants from using experts from any of these states.[5]

In addition, completely absent from the majority's decision is any recognition of the constitutional problems inherent in enforcing §2102. This statute sets a different standard for receiving affidavits executed in another state in a judicial proceeding than applies to an affidavit executed before a notary public in Michigan. In so doing, §2102 runs afoul of the full faith and credit clause of the U.S. Constitution, Art IV, Sec. 1., for the certification clause means that Michigan courts will not give full faith and credit to the laws of other states authorizing notaries public to take affidavits that are valid under the laws of those states without such certification. On the other hand, the URAA recognizes and gives honor to the full faith and credit clause of the U. S. Constitution.

Section 2102 also raises issues under the privileges and immunities clause, Art IV, Sec. 2. of the U.S. Constitution, because it undeniably discriminates against non-resident notaries public, whose acts must be certified to be received in a Michigan court, in favor of resident notaries not subject to this same restriction.

The URAA completely avoids these constitutional perils by placing notarial acts performed outside of Michigan *on the same footing as notarial acts performed within this state.*

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[5] As an example, experts from two of this country's most renowned medical facilities, Yale in New Haven, Connecticut, and Duke University in Raleigh, North Carolina, would automatically be precluded from ever providing an affidavit of merit in support of a medical malpractice victim's claim, or an affidavit of meritorious defense on behalf of a doctor or hospital being sued for medical malpractice. Obviously, such a preclusion raises other issues, such as a violation of the privileges and immunities clause, Art IV, Sec 2.

D. The Panel Erred In Failing To Consider The Underlying Purposes Behind These Statutory Provisions In The Context Of The Affidavit Of Merit Statute.

Finally, the Court of Appeals also erred in failing to consider the underlying purposes behind these statutory provisions in the context of the Affidavit of Merit Statute.

Since an affidavit of merit, like an affidavit of meritorious defense, is required for the limited purpose of guarding against frivolous medical malpractice claims, or ones that cannot be defended, and is not used as evidence in the case to be weighed and evaluated by the trier of fact, the Court of Appeals clearly erred in totally ignoring the fact that an affidavit of merit does not fit within the purpose of MCL 600.2102. This error is highlighted by the holdings *In Re Alston's Estate Beecher v Jamison*, supra, and *Wallace v Wallace*, supra, cases the Court of Appeals cites but ignores in terms of application.

The court in *In re Alston's* held: "Appellant offered no testimony and rested her *case entirely on the petition (affidavit).* The court held that the affidavit could not be considered based upon § 2102. *Id* at 480. Thus it appears from *In re Alton's Estate* that §2102 has been interpreted as involving the narrow purpose of using the affidavit as evidence to support the claim or judgment. *See also, Berkery v Wayne, Circuit Judge, supra,* where the affidavit of Bortz of the amount due was to be used to verify the judgment and was, thus, required to be certified; without such certification, the clerk could not docket the judgment.

Certainly the purpose of the affidavit of merit statute is accomplished where a health professional has signed the affidavit of merit in the presence of a notary public and the affidavit sets forth the substantive elements required by the statute. Those requirements are:

The affidavit "must be signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169";

The affidavit "must certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice";

The affidavit "shall contain a statement of each of the following:

(a) The applicable standard of practice or care.

(b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.

(c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.

(d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.

Failure to have the notary's signature "certified" under the method provided in §2102 simply cannot make an otherwise valid affidavit of merit "grossly nonconforming" as this "certification" has nothing to do with the requirements set forth in the affidavit of merit statute. "Certification" of the notary's signature does not make the affidavit itself any more or less valid or any more or less conforming to the requirements of MCL 600.2912d(1).

The only thing a certification does is provide an added level of proof that the notary public had the proper credentials of a notary public. This added level of proof may be necessary where the affidavit is being used as the only evidence to support a judgment in favor of a party, as in *In re Alston's Estate* or *Berkery, supra.* It is not logical or reasonable, however, to require this added level of proof for an affidavit of merit.

II. IF THERE IS A CLEAR CONFLICT BETWEEN THE URAA AND MCL 600.2102, THIS COURT SHOULD GRANT LEAVE TO RESOLVE THAT CONFLICT.

The majority in *Apsey* found that there was no conflict between the URAA and MCL 600.2102; nevertheless, it resolved the issue presented by utilizing a rule of construction that is sometimes applied where there is a conflict between two statutes, namely by determining which of the statutes is more specific, holding that the more specific applies over the general. *See Imlay Twp Primary School v State Board of Education*, 359 Mich 478, 485, 102 NW2d 720 (1960).

This Court has repeatedly stated that for there to be a conflict between two statutes, the conflict must be "clear". *Shirilla v City of Detroit*, 208 Mich App 434, 439, 528 NW2d 763 (1995). Such a "clear" conflict generally involves a situation where enforcing the two statutes as written would place a party in a Catch-22 dilemna. *Id.*

Such was the case in *Shirilla*, where this Court held the Handicappers' Act conflicted with the later adopted federal regulations of the Motor Bus Transportation Act (MBTA) to the extent MBTA incorporated a federal regulation placing a blanket prohibition on employment of insulin-dependent diabetics in motor carrier driving positions. In discussing the clear conflict between these two statutes, the Court noted:

> By hiring plaintiff as a driver despite his diabetes, defendant would violate § 31 of the MBTA; yet, by refusing to hire plaintiff because of his diabetes, defendant might violate the handicappers' act. Although there is a presumption against implied repeals that requires courts to read statutes harmoniously and give them a reasonable effect [citation omitted], we cannot do so in this case without reading a qualification into 49 CFR 391.41 that simply is not there. Doing so would constitute not a harmonious reading of the two statutes but rather a shortcut of the conflict analysis by merely resolving the conflict in favor of the handicappers' act. Where a clear conflict exists, the later enactment controls. *Wozniak v General Motors Corp*, 198 Mich App 172, 181, 497 NW2d 562 (1993). We therefore deem

> the handicappers' act impliedly repealed in part by § 31 of the MBTA as applied to the facts of this case.

208 Mich App at 439.

In this case, no such Catch-22 exists. If one complies with § 2102 and obtains the certification expressed in that statute, the URAA is not violated. On the other hand, if one takes advantage of the Legislatively "expressed" additional method provided by Section 8 of the URAA, particularly for purposes of an Affidavit of Merit, which has a much more limited purpose that an affidavit that is admitted for purposes of reading into evidence to support or refute a claim, § 2102 is not violated.

Indeed, the Court of Appeals did exactly what this Court in *Shirilla* said should not be done, i.e., it read a qualification into the URAA (i.e., that it does not apply to affidavits used in court proceedings) that is simply not there. In doing so, its analysis was not a harmonious reading of the two statutes but rather a shortcut of the conflict analysis by merely resolving the conflict in favor of § 2102.

As further explained by this Court in *Rathbun v State of Michigan, supra,* 284 Mich at 544: "The legal presumption is that the legislature did not intend to keep really contradictory enactments in the statute books..."

Thus, as discussed above, given the history of these two statutes, the purposes articulated by the National Commissioners on the need for adoption of a uniform act, and the complete, plain, unqualified language of Section 8, no clear conflict exists between MCL 600.2102 and the URAA. Nevertheless, if this Court finds a conflict exists, then it must reiterate how that conflict should be resolved.

The most common rule that has been utilized by this Court in the case of a clear conflict between two statutes is the one discussed in Shirilla, supra, i.e., the rule that the more recently passed statute must control as it is the Legislature's most recent expression of its intention. *Old Orchard v Hamilton Mutual Ins Co*, 434 Mich 244, 257, 454 NW2d 73 (1990); *Pittsfield Township v Washtenaw County*, 468 Mich 702, 713, 664 NW2d 193 (2003); *City of Kalamazoo v KTS Industries, Inc.*, 263 Mich App 23, 687 NW2d 319 (2004); and *Wozniak v General Motors Corp*, 198 Mich App 172, 181, 497 NW2d 562 (1993).[6] This principle is known as the "doctrine of last enactment".

The most recent enactment of the "certification" requirement is MCL 600.2102, was passed in 1963. The URAA, in its present form, was passed in 1969, effective March 20, 1970. Thus, under the "doctrine of last enactment", if there is a clear conflict between these two statutes, Amicus MTLA urges this Court to apply the most frequently used principle for deciding a conflict by holding that the later expression of legislative intent found in the URAA should control.

[6] Plaintiffs-Appellants, in their Cross Application, also cited additional eight (8) cases where this Court has recognized the doctrine of last enactment in resolving two clearly conflicting statutes. See Cross Application, p 35. This list is far from exhaustive on the issue.

III. THIS COURT SHOULD GRANT PLAINTIFFS-APPELLANTS' CROSS APPLICATION BECAUSE THE MAJORITY'S HOLDING THAT A COMPLAINT IS A NULLITY WHERE IT IS FILED BY A MEDICAL MALPRACTICE PLAINTIFF WITH A VALID AFFIDAVIT OF MERIT THAT DOES NOT CONTAIN A § 2102 CERTIFICATION VIOLATES THIS COURT'S HOLDING IN *SCARSELLA V POLLAK.*

Another issue that is important to the jurisprudence of this state is whether a medical malpractice complaint filed with an affidavit of merit that is in compliance with MCL 600.2912d, but does not contain the certification of MCL 600.2102, is a nullity, as held by the Court of Appeals. The Court of Appeals stated:

> In *Scarsella* the Supreme Court was faced with a complete failure to file an affidavit of merit. The Court left for later decisional development the question of the appropriate legal response when a "timely filed affidavit is inadequate or defective." *Scarsella, supra* at 553. Such decisional development from this Court indicates that, "whether the adjective used is 'defective' or 'grossly nonconforming' or 'inadequate', **where a plaintiff's affidavit failed to meet the applicable statutory standards, it "was defective and did not constitute an effective affidavit," and therefore failed to support a medical malpractice complaint for purposes of tolling the period of limitations.**

Opinion, p 6 (emphasis added).

The Court of Appeals' reasoning in this regard is faulty and goes far beyond anything previously indicated by this Court. The Court relied upon the decision of the Court of Appeals in *Geralds v Munson Healthcare*, 259 Mich App 225, 673 NW2d 792 (2003), which held that *any* defect invalidated an affidavit of merit, even where the substantive requirements of MCL 600.2912d were complied with, instead of appropriately look to this Court's decision in *Scarsella v Pollak*, 401 Mich 547, 607 NW2d 811 (2000).

If one looks at the language used by this Court in *Scarsella*, the Court does not appear to have been referencing *any defect* as invalidating an affidavit of merit. This Court stated:

> We do not decide today *how well the affidavit must be framed.* Whether a timely filed affidavit that is *grossly nonconforming* to the statute tolls the statute is a question we save for later decisional development. Neither do we decide the proper handling of a case like Gregory (Dorris) in which there is a bona fide dispute regarding the nature of the case.

461 Mich at 553, n 7 (emphasis added). This Court's use of the language "how well the affidavit must be framed" and "grossly nonconforming" certainly indicates that this Court recognized it was only an affidavit that did not conform to the substantive requirements of MCL 600.2912d that would be rejected as not properly commencing the action, and thus not tolling the statute of limitations. The Court of Appeals has taken this Court's use of the foregoing language in *Scarsella* far beyond non-conformance with the substantive requirements of the Affidavit of Merit statute and has held that any defect, even one such as a certification that is no longer required by a uniform act intended to simplify acts of notaries outside the state of Michigan, as not being in compliance with MCL 600.2912d. In doing so, the Court of Appeals has totally lost sight of the Legislative **intent** of the affidavit of merit statute, which is to prevent frivolous claims.

This Court in *Scarsella, supra,* acknowledged that the purpose of the affidavit of merit statute is accomplished where a health professional has signed the affidavit of merit in the presence of a notary public, it states the required elements set forth in MCL 600.2912d (as discussed *supra*) and it is attached to the complaint when filed. All of those things were done in the instant case. The Court of Appeals acknowledged:

> In this case, neither the need for an affidavit of merit nor the requirement that one be notarized is in dispute.

Opinion, p 2.

Nor was there a dispute over whether the contents of the Affidavit itself or the physician

who signed the Affidavit, conformed to the requirements of MCL 600.2912d. The only issue in *Apsey* was "**what constitutes a valid out-of-state notarization**." Opinion, p 2, emphasis added.

Despite this limited issue, the Court of Appeals in *Apsey* held that the filing of an **uncertified**, yet **indisputably valid**, affidavit of merit with a complaint renders that affidavit a nullity incapable of rectification or cure and, therefore, requires dismissal of the case with prejudice. (Opinion, p 6).

The *Apsey* panel also failed to consider whether, where a Complaint was filed with an Affidavit of Merit that meets the substantive requirement of MCL 600.2912d, the plaintiff is entitled to the tolling effect of MCL 600.5856(a). This Court said in *Scarsella, supra*: "While we acknowledge that where no affidavit was attached, the plaintiff cannot avail itself of this tolling provision", where, as here, there was a valid affidavit attached to the Complaint, the plaintiff be entitled to tolling under § 5856(a).

Again, as Plaintiffs-Appellants have shown in their Cross Application, there is considerable confusion in this area of the law. This confusion provides an additional reason for granting leave in this case to fully resolve the significant legal issues raised by this case.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, and for all of the foregoing reasons, Amicus Curiae MTLA respectfully requests this Honorable Court grant Plaintiffs-Appellants' Cross Application for Leave to Appeal and fully address the issues raised in that Application or, alternatively, summarily reverse the holding in *Apsey v Memorial Hospital* and remand the case for further proceedings.

Respectfully submitted,

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